1889

SOWDAMINI DASSI v. BROUGHTON.

there is no presumption of that kind, then you must look to the facts of the case to ascertain what the intention of the parties was with regard to this fund.

Mr. Justice Trevelyan, in his examination of the evidence in this case, has come to the conclusion that there is nothing to indicate an intention on the part of Badam Kumari to invest these monies for any one's benefit but her own. There is nothing from what took place, to indicate that she intended to hold this money for the benefit of any other person, or to give up the control of it by herself. In my opinion, that view is a correct view of the evidence in this case. I think that the conduct of Badam Kumari during these years shows that she had no intention of accumulating this fund for any one's benefit but her own or that she ever intended to give up the power of disposing, spending, and dealing with it any way, and, as in this case it does not seem to me that the presumption that the money, *primâ facie*, was supposed to be accumulated for the benefit of the husband's estate arises, I think that the conclusion to which Mr. Justice Trevelyan came was correct, and that this appeal must be dismissed with costs.

T. A. P. *Appeal dismissed.*

Attorneys for the appellant: Messrs. *Remfry and Rose*, Baboo *Ashutosh Dhur*.

Attorneys for the respondents: Messrs. *Watkins and Co.*

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

1889 *April* 11.

KHUDIRAM MOOKERJEE (OBJECTOR) *v.* BONWARI LAL ROY (PETITIONER).*

Hindu law—Guardian—Right to guardianship of Hindu widow—Grant of certificate of administration under Act XL of 1858.

The relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. A certificate of administration, under Act XL of 1858, was therefore granted to one of the former in preference to the latter.

* Appeal from Order No. 25 of 1889, against the order of R. F. Rampini, Esq., Judge of Burdwan, dated the 12th of January 1889.

1889

KHUDIRAM MOOKERJEE v. BONWARI LAL ROY.

THIS was an application for a certificate of administration to the estate of a female minor under Act XL of 1858. The applicant, Bonwari Lal Roy, was the brother of the minor. The application was opposed by Khudiram Mookerjee, the sister's son of the husband of the minor, who was a reversionary heir to the property of the minor's deceased husband. The father of the minor was alive, but it appeared that he did not wish to take out the certificate himself, and that he consented to its being granted to the applicant. It also appeared that a certificate of administration of the minor's property had been previously granted to the mother of the minor's deceased husband, and that this certificate was recalled under the provisions of s. 21 of the Act, because her advanced age rendered her unfit to manage the property.

The Judge granted the application.

Khudiram Mookerjee appealed to the High Court.

Baboo *Monmotho Nath Mitter* for the appellant.

Mr. *R. E. Twidale* for the respondent.

The judgment of the Court (BEVERLEY and BANERJEE, JJ.) was delivered by

BANERJEE, J.—This is an appeal against the order of the District Judge of Burdwan, appointing the respondent as the guardian of a minor Hindu widow; and the only question raised before us is whether the respondent, who is the brother of the minor, or the appellant, who is her husband's sister's son, and the reversionary heir, has the preferential right to the certificate.

It appears that a certificate had been granted to the minor's mother-in-law, which was subsequently recalled by reason of her unfitness to manage the property owing to her extreme old age; and the only reason assigned by the learned Judge for giving preference to the minor's paternal relations seems to be the fact of a certificate having once been granted to one of her husband's relations and of its having been subsequently recalled.

That in our opinion would be no good reason for passing over the claims of other relations on her husband's side, if no other reason is made out against them, and if under the Hindu law they are entitled to the certificate in preference to the widow's paternal relations.

1889

KHUDIRAM MOOKERJEE v. BONWARI LAL ROY.

Now under the Hindu law, we think that the relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. This is clear from the text of Nareda, Chapter XIII, *verses* 28, 29, cited in the Dayabhaga, Chapter XI, s. 1, paragraph 64. That text runs thus:—"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as in her maintenance they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*." This text has been followed in three cases, one to be found in Macnaghten's Principles and Precedents of Hindu Law, Volume II, page 203; another, *Kishen Mohan Mitter* v. *Khettermoni Dassi* (1); and a third, the case of *Bai Kisar* v. *Bai Gunga* (2).

This, we think, is ample authority in support of the appellant's contention, and the certificate in this case ought therefore to be granted to the appellant against whose fitness nothing has been said.

The result is that the appeal will be allowed with costs.

J. V. W. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Tottenham.

1889 *March* 21.

AKSHAYA KUMAR DUTT (DEFENDANT) *v.* SHAMA CHARAN PATITANDA (PLAINTIFF).*

Enhancement of rent—Settlement of a Government Khas Mehal—Regulation VII of 1822—*Bengal Act III of* 1878—*Bengal Act VIII of* 1879, *ss.* 10—14.

In order to make the enhanced rent, stated in a *jummabundi*, settled under Regulation VII of 1822, binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law, with reference to enhancement of rent, in force at the time of such enhancement.

* Appeal from Appellate Decree No. 1057 of 1888, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 14th of March 1888, affirming the decree of Baboo Srinath Pal, Munsiff of Diamond Harbour, dated the 21st of April 1887.

(1) 2 Hay, 196; Marsh, 313. (2) 8 Bom., A. C., 31.

1889

AKSHAYA KUMAR DUTT v. SHAMA CHARAN PATITANDA.

D'Silva v. *Raj Coomar Dutt* (1), *Enayetoollah Meah* v. *Nubo Coomar Sircar* (2) and *Reazooddeen Mahomed* v. *McAlpine* (3) followed.

The rent of a Government Khas Mehal can only be enhanced by the same process as the rent on any private estate.

Quære:—Whether a *jummabundi* is a public document?

THIS was a suit brought by an izarahdar to recover rent from a tenant.

The plaintiff stated that he formerly held an izarah of certain lands under Government; that on the expiration of such izarah, Government held the lands khas, and when so holding took, in the year 1283 (1876-77), a measurement of the said lands, the result of which was (amongst other matters) that the defendant, who was a ryot under Government, and who formerly held a *jumma* of Rs. 780, was found to be holding 1,374 bighas of land, and was assessed according to the *jummabundi* at Rs. 950-2-1, and he therefore entered into a kabuliat in respect of this land at the rate mentioned.

Subsequently to the measurement and *jummabundi* being confirmed by the Board of Revenue, the plaintiff took an izarah of the whole Mehal for twenty years at an annual *jumma* of Rs. 3,000.

The defendant fell into arrears with his rent, and the plaintiff, as his superior landlord, sued him for the same at the enhanced rent settled by the Government in the year 1283.

The defendant denied that the rent had ever been enhanced or that he had ever assented to the *jumma* fixed by the new assessment.

The Munsiff found that the *jummabundi* had been prepared under Regulation VII of 1822, and that it was unnecessary that the defendant should have consented to the *jummabundi*; that the defendant had not, in accordance with s. 10 of Bengal Act VIII of 1879, contested by suit the assessment made by Government; and that, therefore, he was liable to pay the rent recorded against his name in the *jummabundi*.

The defendant appealed to the District Judge, who found that it was not clear whether the settlement by Government was

(1) 16 W. R., 153. (2) 20 W. R., 207.
(3) 22 W. R., 540.

1889

AKSHAYA KUMAR DUTT v. SHAMA CHARAN PATITANDA.

made before or after Bengal Act VIII of 1879 came into force, but that for the purposes of the appeal he assumed the settlement to have been made under Regulation VII of 1822, and held that there was nothing in either Regulation VII of 1822 or in Bengal Act VIII of 1879 or the present Tenancy Act requiring a ryot's assent to the *jumma* imposed, or making it necessary for the zemindar to serve a special notice on him, calling upon him to attend at the settlement; he therefore dismissed the appeal.

The defendant appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey* for the appellant.

Baboo *Doorga Mohun Das* and Baboo *Sarut Chunder Roy* for the respondent.

The judgment of the Court (WILSON and TOTTENHAM, JJ.) was as follows:—

In this case the first thing that is important is to ascertain, as accurately as we can, what the facts as found by the lower Appellate Court are to which we have to apply the law. The suit is brought by an izarahdar to recover rent from tenants at an enhanced rate. The case made is that the property on which the tenants hold is a Khas Mehal of Government; that the plaintiff and another formerly held an izarah of the Mehal; that then it fell into the Khas possession of Government, and that in about the year 1876 a fresh settlement was made under which the rent of these tenants was enhanced; that subsequently the plaintiff and another again took an izarah, and the plaintiff alleges his title to sue for and recover rents from the tenants at the enhanced rate.

The District Judge, before whom the case came on appeal, says this:—"The Deputy Collector, Baboo T. C. Mitter, who made the re-settlement on behalf of Government, raised the *jummas* to" so and so. "The *jummabundi* was in due course approved by the Board of Revenue, but it is not clear whether the settlement was before or after Bengal Act VIII of 1879 came into force. I shall, for the purposes of this appeal, assume that the settlement was made under Regulation VII of 1822." Then he describes the present appearance of the *jummabundi*, and he

goes on:—"Now, no doubt, if it were necessary in case of a re-settlement of a Khas Mehal to prove that the tenants assented to pay any enhanced rent assessed on them, or it were necessary to prove that a notice, calling on each tenant to attend at the settlement, must be proved to have been served on each individual tenant, it would be exceedingly difficult in the present case to say that the defendant was bound by the settlement. I am not aware, however, of anything either in the Regulation VII of 1822 or in the Bengal Act VIII of 1879, or the present Tenancy Act, which either requires the ryot's assent to the *jumma* imposed, or makes it necessary to prove that a special notice was served on any individual tenant."

Now, we think, the intention of the District Judge must have been to find this: that if it were necessary, under the circumstances of the case, in order to comply with the law, as it existed before Bengal Act VIII of 1879, or the earlier Bengal Act III of 1878, to show either of two things, either the consent of the tenants to the *jummabundi* as recorded, or a notice of enhancement served upon the tenants, to justify the enhancement, then the case of the plaintiff was not made out, for that there was neither assent established nor notice proved. But the District Judge went on to hold that neither of these conditions need be complied with. Taking that to be the finding of fact, and that to be the proposition of law, we have to say whether the proposition has been correctly laid down; and, it appears to us that it has not been correctly laid down. It has been held in a series of cases that one or other of two things must occur in order to make the enhanced rent stated in a *jummabundi* settled under the Regulation which has been referred to, binding upon a tenant. There must be either an assent to that enhancement, or else there must be a compliance with the provisions of the rent law which was in force at the time, Bengal Act VIII of 1869, with regard to enhancement of rent; because it was long settled law, established by a series of decisions, that the rent of a Government Khas Mehal could only be enhanced by the same process as the rent on any private estate.

With regard to that it is not necessary to refer to more than a few cases. There is the well-known case of *D'Silva* v. *Raj*

1889

AKSHAYA KUMAR DUTT v. SHAMA CHARAN PATITANDA.

Coomar Dutt (1); the case of *Enayetoollah Meah* v. *Nubo Coomar Sircar* (2); and the case of *Reazooddeen Mahomed* v. *McAlpine* (3).

In the first Court reliance was placed upon the case of *Taru Patur* v. *Abinash Chunder Dutt* (4) as an authority for the contrary proposition; but it appears to us that that case is not really an authority for that for which it has been cited. All that was there decided was that the settlement *jummabundi* is a public document, and is admissible in evidence as such under s. 74 of the Evidence Act. It is evident that the question, whether it is admissible in evidence as a public document, and the question whether that which is in it is binding upon tenants without reference to the question of consent or notice, are entirely separate matters, and it is right to notice that even as to that which was actually decided in that case, *viz.*, that the document was a public document, the question is now open to some degree of doubt, because it has been seriously questioned by the late Chief Justice and Mr. Justice Macpherson in the case of *Ram Chunder Sao* v. *Bunsidhur Naik* (5). The passage occurs in p. 743 of the report.

It appears to us, therefore, that if this matter is to be disposed of under the provisions of the law as it was settled, independently of the Bengal Acts of 1878 and 1879, the decision of the lower Appellate Court cannot be supported.

In the first Court, reliance was placed on Bengal Act VIII of 1879. Now, if there be any section in that Act which makes this *jummabundi* binding upon the tenants in question, it is s. 10, which says:—"Every under-tenant and ryot shall be liable to pay the rent recorded as demandable from him under this Act, unless it shall be proved in any suit instituted by such under-tenant or ryot to contest his liability to pay the same that such rent has not been assessed in accordance with the provisions of this Act." Taking that alone, it could not, we think, affect this case, because it only deals with the rent recorded as demandable under the Act, that is to say, in compliance with the provisions

(1) 16 W. R., 153.
(2) 20 W. R., 207.
(3) 22 W. R., 540.
(4) I. L. R., 4 Calc., 79.
(5) I. L. R., 9 Calc., 741.

of ss. 6 and 9, and those sections can only be complied with, if the settlement is actually made in accordance with the terms of the Act. And practically, therefore, it is hardly possible that a settlement could be made which would be affected by s. 10 unless it were substantially made after those clauses came into operation. But reference has further been made to s. 14, which says: "The provisions of this Act shall apply to all settlement proceedings under Regulation VII of 1822, which may have been confirmed after the commencement of Bengal Act III of 1878, or which may hereafter be confirmed or sanctioned by the Revenue authorities from time to time empowered in that behalf by the Lieutenant-Governor, whether such proceedings shall have been commenced before or after the commencement of the said Act." That, no doubt, makes the Act retrospective in this sense, that the effect of settlement proceedings having been commenced before the passing of the Act of 1878, or the Act now in question, is not fatal to the notion of the Act applying. On the other hand, it only makes the Act retrospective; and the provisions of the Act themselves only apply to settlements made in accordance with the terms of the Act, and they cannot therefore have any application to a case in which it has been found by the lower Courts that the settlement was made about two years before the first of the two Acts came into operation. For these reasons we think that this appeal must succeed. The appeal is against the decision of the lower Appellate Court to this extent that the defendant objects to any rent having been allowed to the plaintiff in excess of the old admitted rate of rent, and in accordance with the enhanced rent. The details of the matter can readily be settled between the parties. The amount deposited by the defendant will be taken into account, and a decree made accordingly. In any event the appellant will have his costs of this appeal.

T. A. P. *Appeal allowed.*

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1889
April 16.

HARO PRIA DABIA (DECREE-HOLDER) *v.* SHAMA CHARAN SEN (JUDGMENT-DEBTOR).*

Insolvency—Insolvent debtors under Civil Procedure Code—Civil Procedure Code, ss. 344, 350, 352, 357, 358—*Debt not in Schedule—Omission to come in and prove debt.*

A judgment-debtor, arrested in execution of a decree, filed his petition and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend; and her name was not included in the schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent: *Held* that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property.

Semble.—Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them.

SHAMA CHARAN SEN, the judgment-debtor, having been arrested in execution of a decree obtained by Haro Pria Dabia, applied to be declared an insolvent under s. 344 of the Code of Civil Procedure, duly setting forth in his application the names and residence of his creditors, amongst them his decree-holder, Haro Pria Dabia. A day was fixed for hearing the application, and notices were served on Haro Pria and the other creditors. Haro Pria and certain other creditors opposed the application, but eventually, on 22nd April 1887, Shama Charan was declared to be an insolvent and a receiver of his property was appointed. On the same day, in the presence of the opposing creditors or their pleaders, the Court fixed a day, 26th May, for the creditors to

* Appeal from Order No. 45 of 1889, against the order of F. H. Harding, Esq., Judge of Chittagong, dated the 10th of November 1888, reversing the order of Baboo Debender Chunder Mookerjee, Munsiff of that District, dated the 16th of August 1888.

produce evidence of the amount and particulars of their respective claims against the insolvent. Haro Pria Dabia did not appear to prove her claim; but some of the other creditors appeared and proved the amount due to them, and a schedule was framed by the Court of those creditors and their debts proved, a copy of which schedule was stuck up in the Court-house. On the 29th October 1887, no other creditor having applied under s. 353 of the Code of Civil Procedure, the receiver was directed to proceed under s. 356, and to report the result to the Court, and in his report the insolvent was, on 2nd March 1888, discharged under s. 355; the money in the hands of the receiver was disbursed to the scheduled creditors under s. 356, and the surplus was made over to the insolvent. Subsequently, on the 20th March 1888, Haro Pria applied to the Court for execution of the decree obtained by her against Shama Charan previously to the insolvency proceedings by attachment and sale of the insolvent's property.

The Munsiff allowed the application, holding that the discharge of the insolvent was no bar to the execution.

The Judge on appeal reversed that order and held that the execution of the decree could not be allowed. The decree-holder appealed to the High Court.

Munshi *Seraj-ul-Islam* for the appellant.

Baboo *Jogender Chunder Ghose* for the respondent.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

It seems to us clear that the learned District Judge is wrong in the conclusion at which he has arrived. The material facts are shortly as follows:—The appellant obtained a decree against the respondent. The respondent on being arrested on this decree, filed his petition under the insolvency section of the Code of Civil Procedure. The procedure laid down in Chapter XX seems to have been carried out, and, in course of time, the creditors were required to prove their debts. The appellant before us, although she seems to have received notice, did not attend, and, in the result, her name was not included in the schedule. The scheduled creditors, that is to say the persons who proved

1889

HARO PRIA DABIA v. SHAMA CHARAN SEN

their debts, have been paid and the residue of the property in the hands of the receiver has been paid out to the insolvent. Now this decree-holder seeks to execute her decree against the property of the insolvent.

We have heard argument on behalf of the respondent, and the effect of that argument is shortly this: The learned pleader contends that, as the decree-holder did not attend before the District Judge and give evidence, the whole debt is wiped off, and he argues that his client having got a discharge from his scheduled debts, they are not debts at all.

There can be no doubt that, where a person has got a right, and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment, that there can be no doubt about it. The section of the Code as to discharge, is s. 357. The first portion of that section gives an insolvent a release, so far as arrest and imprisonment are concerned, from his scheduled debts. It then goes on not to give him a discharge in respect even of the scheduled debts, but it goes on to say this: "Subject to the provisions of s. 358, his property, whether previously or subsequently acquired, except the particulars specified in the first proviso to s. 266, and except the property vested in the receiver, shall, by order of the Court, be liable to attachment and sale, until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years from the date of the order of discharge under s. 351 or 355." That is to say, all the property in the hands of the receiver is to be sold, and the proceeds paid to the scheduled creditors; and besides that, his other property is liable to be attached and sold until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years. Probably the effect of that would be to discharge him from the debts to the scheduled creditors entirely, but there is no reference there to any persons whose names are omitted from the schedule. We do not think that the fact that a creditor is invited to prove his claim limits or destroys his rights. There is no doubt that, if he had not been so invited, a creditor would not be affected by s. 357.

It is said that the effect of her omission to come in operates as a decree dismissing her claim. We cannot hold that when we have here a decree-holder, whose decree is admitted, and execution of whose decree is the cause of these insolvency proceedings being taken.

We think it is necessary for us to notice what does appear at first sight to be somewhat anomalous in the provisions of s. 352. As the learned pleader points out, although an insolvent may come into Court seeking to be released from his debts, and although the object of those proceedings is to release him from those debts, if a creditor does not come in and prove his debts, this would prevent an insolvent acquiring the relief that the Code contemplates giving him.

That is unfortunate, but unless the Act takes away existing rights, we cannot say that the rights have ceased to exist. This question is not for us, but for the Legislature to consider. But as Mr. Justice Banerjee pointed out during the argument, it is possible to read s. 352 a little less strictly than is suggested, and to say that an insolvent might come in and prove the debts of the creditors if he wishes to get a discharge from them. That would get rid of the difficulty.

It seems to us that as s. 357 does not give the debtor any right to get his discharge from this debt, we must allow execution to go. In the result we set aside the order of the District Judge, and restore that of the Munsiff. The judgment-creditor is entitled to her costs in the lower Appellate Court and in this Court.

J. V. W.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Gordon.

1889
May 15.

SHEWBARAT KOER (PLAINTIFF) *v.* NIRPAT ROY AND OTHERS (DEFENDANTS).*

Appeal—Superintendence of High Court—Bengal Tenancy Act (VIII of 1885), ss. 104, cl. 2, 105, 106, 108—Rule 33 of the rules made under the Act—Jurisdiction—Record of right—Civil Procedure Code (Act XIV of 1882), ss. 108, 622.

The High Court has no jurisdiction either to entertain a second appeal from, or to interfere under s. 622 of the Code of Civil Procedure with, an order of a Special Judge in regard to settlement of rents.

THE ryots of one Shewbarat Koer who was the proprietor of mouzah Pupri in Mozufferpore, applied, under s. 104, cl. (2) of the Bengal Tenancy Act, for settlement of their rents; and on the 10th July 1886 the Assistant Settlement Officer passed an *ex parte* order settling such rents. On the 20th November 1886 Shewbarat put in a petition to the Assistant Settlement Officer, stating that the rates of rent, as stated in that officer's "Khettian," did not agree either with the rates the ryots had mentioned, or with the rate as appeared in her Sherista. The Assistant Settlement Officer thereupon directed the petitioner to file a detailed list of her ryots, showing the rental paid by them. This was done on the 2nd December 1886. The Assistant Settlement Officer thereupon passed an order, refusing to re-open the case, the rents having been settled under s. 104 of the Tenancy Act.

Shewbarat appealed against this order to the Special Judge who held that the appellant should have applied to the Assistant Settlement Officer under s. 108 of the Civil Procedure Code, and not under s. 105 of the Bengal Tenancy Act of 1885, and dismissed the appeal.

Shewbarat appealed to the High Court.

Baboo *Tarack Nath Palit*, for the appellant, contended that s. 105 of the Tenancy Act and Rule 33 of the rules made under that Act clearly pointed out the remedy in this case.

* Appeal from Appellate Decree No. 1326 of 1888, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 25th of April 1888, affirming the decree of E. W. Collin, Esq., Settlement Officer of Mozufferpore, dated the 1st of March 1887.

Baboo *Sharoda Charan Mitter*, for the respondents, submitted, that there was no appeal against the order of the Special Judge; the High Court having no jurisdiction to entertain appeals from a Special Judge, save under s. 106 of the Rent Act.

The judgment of the Court (TOTTENHAM and GORDON, JJ.) was as follows:—

It appears to us that in this case the High Court has no jurisdiction either to entertain a second appeal, or to interfere with the order of the District Judge under s. 622 of the Code of Civil Procedure.

The matter in dispute is an entry in the record of rights and of rents settled, made under Chapter X of the Bengal Tenancy Act. The settlement appears to have been made *ex parte*, the Zemindar not having been present. Subsequently the Zemindar objected to the entry, and sought to have it corrected. The Revenue Officer declined to re-open the matter, and the Zemindar appealed against his order (and apparently she had a right to do so) to the District Judge, who is Special Judge under the Tenancy Act. The District Judge held that the only remedy which the Zemindar had was to apply to set aside the *ex parte* order under s. 108 of the Code of Civil Procedure, and he dismissed the appeal. The Zemindar has preferred a second appeal to this Court.

It has been pointed out to us by the respondents' vakil that we have no jurisdiction to entertain this appeal. It appears that the only cases in which the High Court has jurisdiction to entertain appeals from the decisions of a Special Judge are cases under s. 106. Clause 3 of s. 108 of the Rent Act gives the High Court jurisdiction to hear appeals in such cases as if the Special Judge were a Court subordinate to the High Court within the meaning of Chapter XLII of the Code of Civil Procedure. Section 106 provides for the hearing and decision of disputes regarding the record of rights by a Revenue Officer; but that section excludes from a Revenue Officer's consideration disputes regarding the entry of rent settled under the chapter. This entry, therefore, is not such as can be decided or entertained under s. 106; and therefore it appears to us that the High Court has no jurisdiction to hear an appeal from an order of a Special Judge

1889

SHEWBARAT KOER v. NIRPAT ROY.

in regard to settlement of rent. In respect of that entry, a Special Judge is not a Court subordinate to the High Court; and that being so, we have neither appellate jurisdiction over him, nor any authority under s. 622 of the Code to interfere with his order.

The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice Tottenham and Mr. Justice Gordon.

1889
April 25.

NUNDUN LALL (DECREE-HOLDER) *v.* RAI JOYKISHEN AND OTHERS (JUDGMENT-DEBTORS).*

Limitation Act (1877), *Art.* 179, *para.* (2)—*Appeal against whole decree by one defendant only—Execution of decree—Execution against judgment-debtor who did not appeal.*

A plaintiff obtained on the 14th September 1881 a decree against two defendants, the decree as against the first defendant being one for partition; and as against the second defendant (who had set up a julkar right on the lands claimed to be partitioned, and had contended that partition could not be had, and had obtained a partial decree, but had been ordered to pay partial costs to the plaintiff), being one for costs.

The first defendant alone appealed against this decree, but unsuccessfully, his appeal being dismissed on the 18th January 1884. The decree-holder applied for execution of his decree as against the second defendant for cost in December 1886. *Held* that the application was not barred, for that limitation ran from the 18th January 1884.

NUNDUN LALL, one of the proprietors of mouzah Hosseinpore, which mouzah was, in the year 1881, partitioned by the Collector save and except a portion thereof, measuring 91 bigahs at that time under water. Subsequently the water on this portion dried up, and it became fit for cultivation. Nundun Lall thereupon applied to the Collector for partition of this portion; his application was however rejected on the ground that this land did not form part of the revenue-paying estate of Hosseinpore. Thereupon Nundun Lall brought a regular suit against the Secretary of

* Appeal from Order No. 224 of 1888, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 13th of March 1888, reversing the order of Baboo Grish Chunder Chatterjee, Subordinate Judge of that district, dated the 29th of June 1887.

1889

NUNDUN LALL v. RAI JOYKISHEN.

State for India in Council to compel partition. The Secretary of State appeared and contended that the land did not form part of Hosseinpore, and could not therefore be partitioned. In this suit one Rai Joykishen intervened, and was made a party defendant thereto: he then set up a julkar right and objected to partition. The suit was on the 14th September 1881 decreed in favour of Nundun Lall, but the Subordinate Judge found that the 91 bigahs in question were sometimes covered with water, and at other times dry land. He therefore made his decree subject to the intervenor's julkar rights during the periods that the land was under water, and directed him to pay a proportionate amount of costs to the plaintiff as he had been unsuccessful in his contention that the land ought not to be partitioned.

Against this decree, the Secretary of State alone appealed, contending that the whole suit should have been dismissed; his appeal was however dismissed by the High Court on the 18th January 1884.

On the 19th July 1886, Nundun Lall applied for execution of his decree; this application was however dismissed, and on the 3rd December 1886 a further application was made by him for execution as against the intervenor defendant for costs. The intervenor objected that the plaintiff's decree had become final as against him on the 14th September 1881, and that therefore the application was barred by limitation.

The Subordinate Judge, before whom the application was made, held relying on the case of *Raghunath Persad* v. *Abdul Hye* (1), that the application was not barred; the appeal by the Secretary of State, if it had been successful, being one which would have led to the dismissal of the whole of the plaintiff's suit, and therefore with loss of his costs obtained against the intervenor defendant; that limitation ran therefore as from the date of the High Court decree of the 18th January 1884.

The intervenor defendant appealed to the District Judge, who on the authority of the cases of *Sangram Singh* v. *Bujharat Singh* (2) and *Hur Pershad Roy* v. *Enayet Hossein* (3) held that

(1) I. L. R., 14 Calc., 26. (2) I. L. R., 4 All., 36.
(3) 2 C. L. R., 471.

1889

NUNDUN LALL v. RAI JOY-KISHEN.

limitation ran as against the intervenor from the 14th September 1881, he not having appealed from the decree of that date.

The decree-holder appealed to the High Court.

Baboo *Abinash Chunder Banerjee*, for the appellant, contended that the application was not barred, limitation running from the date of the final decree of the High Court, and cited *Gungamonee Dossee* v. *Shib Sunkar Bhuttacharjee* (1), *Mullick Ahmed Zumma* v. *Mahomed Syed* (2), *Basant Lal* v. *Najmunnissa Bibi* (3).

Moulvi *Mahomed Yusuf*, for the respondents, contended that the application was barred, relying on *Hur Proshad Roy* v. *Enayet Hossein* (4), *Sangram Singh* v. *Bujharat Singh* (5), *Hingan Khan* v. *Ganga Parshad* (6), *Raghunath Pershad* v. *Abdul Hye* (7).

The judgment of the Court (TOTTENHAM and GORDON, JJ.) was as follows :—

The question in this appeal is whether execution of the decree, obtained by the plaintiff-appellant against the respondents, is barred by limitation.

The case is governed by Article 179 of the second schedule of the Limitation Act. The decree was passed in the Court of first instance on the 14th September 1881. The case came up ultimately on second appeal to the High Court, and the High Court's decision, *Secretary of State* v. *Nundun Lall* (8), was passed on the 18th January 1884. Applications for execution were made in July and December 1886. Article 179, clause 2, provides that, where there has been an appeal, the date of the final decree or order of the Appellate Court is the date from which limitation begins to run.

Upon the face of the proceedings, this application would appear not to be barred by limitation; but the lower Appellate Court, upon consideration of various authorities cited by it,—cases in the Calcutta High Court and in that of Allahabad,—has come to the

(1) 3 C. L. R., 430.
(2) I. L. R., 6 Calc., 194.
(3) I. L. R., 6 All., 14.
(4) 2 C. L. R., 471.
(5) I. L. R., 4 All., 36.
(6) I. L. R., 1 All., 293.
(7) I. L. R., 14 Calc., 26.
(8) I. L. R., 10 Calc., 435.

conclusion that, as against the present respondents, execution of the decree is really barred. For it seems that the present respondents were not parties to the appeal from the Subordinate Judge's decision dated the 14th September 1881.

It was contended that, as against them, the appeal preferred by another defendant would not have affected the decree; and therefore as against these respondents the decree was really final when it was allowed to go by them without an appeal.

The suit was one for partition of certain lands. The present respondents intervened in that suit, and were made defendants upon the plea that no partition could take place, because they had julkar rights over the land in question which, they said, was submerged by water. Another party to the suit was the Secretary of State for India. His defence was that the land in question did not belong to the estate of the plaintiff, and he also contended that no partition could be made.

It may be that he intended to contend only that no partition could be made by the Collector under the butwara law; but at any rate he contended that no partition could be made, and alleged that the land did not belong to the plaintiff's estate. The decree was in favour of the plaintiff, and the Secretary of State was the only party who appealed. In the High Court his appeal was practically successful, so far as Government was concerned,—that is, the High Court was of opinion that the land could not be partitioned under the butwara law by the Collector, though it could be partitioned under the Code of Civil Procedure, and the Secretary of State was discharged from the suit with his costs.

We are asked, upon the circumstances of the case, to hold that Article 179 of the schedule of the Limitation Act should not be applied literally to this case, but should be modified in the sense in which it has been modified already in certain cases in the Calcutta and Allahabad High Courts. Those cases are *Hur Proshad Roy* v. *Enayet Hossein* (1), *Sangram Singh* v. *Bujharat Singh* (2), *Hingan Khan* v. *Ganga Pershad* (3), and *Raghunath Pershad* v. *Abdul Hye* (4). On the other hand, we have been referred to cases in this Court and in the High Court of Allahabad

(1) 2 C. L. R., 471.
(2) I. L. R., 4 All., 36.
(3) I. L. R., 1 All., 293.
(4) I. L. R., 14 Calc., 26.

1889

NUNDUN LALL v. RAI JOY-KISHEN.

in which the decisions favour the appellant's contention in the present case. Those cases are *Gungamonee Dassee* v. *Shib Sunkur Bhuttacharjee* (1), *Mullick Ahmed Zumma* v. *Mahomed Syed* (2), and *Basant Lal* v. *Najmunnissa Bibi* (3). In one of these cases, namely *Gungamonee Dassee* v. *Shib Sunkur Bhuttacharjee* (4), the Judges went entirely upon the words of the article, and it seems to us that, in a question of limitation, we ought to abide as strictly as possible by the terms of the law. We should not be disposed to import into the law any further restrictions, as to the rights of parties to sue and to execute their decrees, than the the law itself expressly provides; but we are bound to recognise the fact that the law has been by interpretation, so to say, modified by decisions of this Court and the High Court of Allahabad. If therefore those cases were on all fours with the present one, we should feel bound to follow the decisions, unless we thought it right to refer the matter to a Full Bench. But we think that the present case does not come exactly under the rule laid down in those cases. In those cases in which execution was held to be barred as against parties who were not parties to the appeal; the decision rests expressly upon the ground that the appeal made by one did not and could not affect the decree as against others of the parties concerned in the case. In one case a former Chief Justice, Sir Richard Couch, in delivering judgment, said that the decree being against various parties for various reliefs in reality amounted to several decrees, although embodied in one paper. The rule governing this decision appears to be shortly this, that unless the whole decree was imperilled by the particular appeal which was preferred, the decision in the appeal would not alter the period of limitation in respect of execution of the decree as between other parties to the suit. In the present case we think that the whole decree was imperilled by the Secretary of State's appeal. Had he succeeded fully in maintaining his contention, namely that the land did not belong to the plaintiff's estate, his appeal would have been decreed, and as a matter of course practically the result would have been that the plaintiff's suit would have been dismissed; and he would have been precluded from executing any decree as against

(1) 3 C. L. R., 430.
(2) I. L. R., 6 Calc., 194.
(3) I L. R., 6 All., 14.
(4) 3 C. L R., 430.

the present respondents. We are not bound, and we have no inclination to introduce into the limitation law any restrictions further than those which have been adopted by this Court on previous occasions. We think that the present case does not come within the further restrictions which we have mentioned, and that, upon the face of the proceedings and of the law, the execution in question is not barred.

1889

NUNDUN LALL v. RAI JOYKISHEN.

That being so, we decree this appeal, setting aside the order of the lower Appellate Court and restoring that of the first Court, with costs.

T. A. P. *Application allowed.*

Before Mr. Justice Tottenham and Mr. Justice Gordon.

MUNGESHUR KUAR AND OTHERS (JUDGMENT-DEBTORS) v. JAMOONA PRASHAD (DECREE-HOLDER).*

1889 *May* 14.

Civil Procedure Code (Act XIV of 1882), s. 244—Claim to attached property—Question to be decided in execution—Liability of property to be sold in execution.

The question whether property is liable to be sold in execution of a decree is one to be determined under s. 244 of the Code of Civil Procedure. *Chowdhry Wahed Ali* v. *Jumace* (1) followed in principle.

ON the 20th April 1887 one Jamoona Prashad obtained a decree for Rs. 3,374 against one Panchu Kuar, the widow of Rajkumar Baboo Kali Pershad Singh. The debt in respect of which the decree was obtained was apparently incurred by the lady for payment of Government revenue and other public demands, but the decree itself was simply a personal decree, and created no charge on her husband's estate which had come into her possession. The decree-holder took out execution, and caused certain shares in the villages of Shampar and Shampur Dearah, which he described as the property of the judgment-debtor, to be attached and advertised for sale. But prior to the date (the 15th September 1887) fixed for the sale Panchu Kuar died, and further

*Appeal from Order No. 46 of 1889, against the order of A. C. Brett, Esq., Judge of Tirhoot, dated the 28th of January 1889, reversing the order of Baboo Anant Ram Ghose, Subordinate Judge of Tirhoot, dated the 11th of August 1888.

(1) 11 B. L. R., 149; 18 W. R., 185.

1889

MUNGESHUR KUAR v. JAMOONA PRASHAD.

proceedings were accordingly stayed, pending the determination of the question as to who were her representatives for the purpose of executing the decree. Several petitions relating to this question and the execution of the decree were then filed from time to time by some of the daughters of the deceased, as well as by the decree-holder, and ultimately, on the 21st May 1888, one of the daughters, Sundar Kuar, having filed a certificate granted by the Judge of Sarun to her and her sisters, Mungeshur Kuar and Tapessar Kuar, to collect debts due to their mother Panchu Kuar, the Subordinate Judge, before whom the execution proceedings were pending, ordered execution to proceed against the daughters as heiresses and representatives of the deceased judgment-debtor, and the usual notice to be served on them. This order was written in vernacular in the order sheet, but on the reverse an order was written in English, directing execution to proceed against Sundar Kuar alone. The effect of the order recorded in the order sheet was taken to be to bring on the record, for the purpose of executing the decree, all the three daughters of Panchu Kuar, as was prayed in the petition.

On the 16th June 1888 the execution case was struck off the file because the necessary process fees had not been deposited by the decree-holder. But on the 18th June the decree-holder filed a fresh application for execution against the three daughters, and the property referred to above was again advertised for sale on the 15th August 1888. But on the 28th July 1888 the daughters filed a petition objecting to the sale of the property in question on the ground that it belonged to their father, and not to their mother; and that on their mother's death it had devolved upon them as heiresses of their father, and could not therefore be followed in execution of a personal decree against their mother. The Subordinate Judge, assuming apparently that the property belonged to the estate of their father, and was not the *stridhan* of their mother, released it from attachment. The decree-holder then appealed to the District Judge, and the judgment-debtors raised a preliminary objection that their objection before the Subordinate Judge was a claim under s. 278 of the Civil Procedure Code, and that therefore no appeal lay. The learned Judge over-ruled this objection, and held that s. 244 applied;

and, on the merits, he was of opinion that there was no proof on the record that the attached property belonged to the father, and that, as the debt was one incurred for the payment of Government revenue, there was a legal necessity for it, which would bind the father's estate. He accordingly reversed the order of the Subordinate Judge, and directed execution to proceed.

The daughters appealed to the High Court.

Baboo *Hem Chandra Banerjee* and Baboo *Sharoda Churn Mitter*, for the appellants, contended that the case before the Subordinate Judge was in the nature of a claim under s. 278 of the Code and that no appeal lay to the District Judge, relying on the following cases:—*Shankar Dial* v. *Amir Haidar* (1), *Nath Mal Das* v. *Tajamul Husain* (2), *Bahori Lal* v. *Gauri Sahai* (3), *Roop Lall Dass* v. *Bekani Meah* (4), *Kameshwar Pershad* v. *Run Bahadur Singh* (5), *Kanai Lall Khan* v. *Sashi Bhuson Biswas* (6); and further contended that the properties were not liable to be sold, as they had devolved on the appellants as heiresses of their father. *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (7).

Mr. *M. P. Gasper* and Baboo *Rajendro Nath Bose* for the respondent.

The judgment of the Court (TOTTENHAM and GORDON, JJ., after stating the facts, proceeded as follows) :—

It is contended on behalf of the appellants, *firstly*, that the case before the Subordinate Judge was in the nature of a claim under s. 278, Civil Procedure Code, and that therefore no appeal lay to the District Judge; and, *secondly*, that the property is not liable to be sold, because it devolved on the appellants as heiresses of their father and not of their mother.

As regards the first point, we are of opinion that the case is governed by the provisions of ss. 234 and 244, Civil Procedure Code. It is clear from what we have already said that the appellants were brought on the record as representatives of the deceased judgment-debtor, without reference to their liability or non-liability as

(1) I. L. R., 2 All., 752.
(2) I. L. R., 7 All., 36.
(3) I. L. R., 8 All., 626.
(4) I. L. R., 15 Calc., 439.
(5) I. L. R., 12 Calc., 458.
(6) I. L. R., 6 Calc., 776.
(7) I. L. R., 14 Calc., 316.

1889

MUNGESHUR KUAR v. JAMOONA PRASHAD.

such representatives. This was in accordance with para. 1 of s. 234. Then as to their liability, that question has to be ascertained according to the provisions of para. 2 of s. 234 by the Court executing the decree. In the present case the question was whether certain property was liable to be sold in execution, and we think that such a question is a question relating to the execution of the decree between the decree-holder and the appellants, and that consequently it has to be determined under s. 244, Civil Procedure Code. It is strongly urged that as the property came into the hands of the appellants through their father, they are in respect of such property his legal representatives, and not representatives of their mother. Assuming that the property did belong to their father, and this is a disputed question before us, this contention is no doubt true. But after all, it seems to us that this is rather a matter of liability than of representation. The liability of the property to be sold in execution depends upon the determination of the question, whether it was the father's or the mother's, and upon the determination of the same point depends the question whether the appellants are in respect of this property the legal representatives of their father or their mother. But as we have already intimated we think that question falls within the scope of s. 244. It is also contended that the form of the proceedings before the Subordinate Judge shows that he treated the case as one coming under s. 278, and not under s. 244. The petition of the appellants has been read to us, and we find no reference in it to s. 278, and the mere use of the word "claim" by the Subordinate Judge in his judgment is not in our opinion inconsistent with the objection of the appellant's coming under s. 244.

Further, in the view we take we think we are fully supported by authority. In the case of *Chowdhry Wahed Ali* v. *Jumaee* (1) the Privy Council, dissenting from the opinion of a Full Bench of this Court, held that, "when a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying that he should not be considered a party to

(1) 11 B. L. R., 149; 18 W. R., 185.

the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within the meaning of the 11th clause of the Act of 1861."

That was a case under the old Code, and there is this difference between it and the present case, that in that case the decree was against the representative, whereas in this case the representatives have been brought in after decree. But this we think makes no difference. The principle laid down applies to both cases, as the liability of a representative under ss. 234, and 252, Civil Procedure Code, is substantially the same.

The Privy Council decision was followed by this Court in the cases of *Oseemunnissa Khatoon* v. *Ameeroonissa Khatoon* (1) and *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (2) [this case is very similar to the present]; by the Allahabad High Court in *Ram Ghulam* v. *Hazaru Kuar* (3), and *Kashi Prasad* v. *Miller* (4); by the Madras High Court in the case of *Kuriyali* v. *Mayen* (5); and by the Bombay High Court in the case of *Nimba Harishet* v. *Sitaram Paraji* (6). The following rulings are relied upon on behalf of the appellants, but we think they are clearly distinguishable from the present case:—*Shankar Dial* v. *Amir Haidar* (7), *Nath Mal Das* v. *Tajamal Hossein* (8), *Bahari Lal* v. *Gauri Sahai* (9), *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (10), *Roop Lall Das* v. *Bekani Meah* (11), *Kameshwar Pershad* v. *Run Bahadur Singh* (12), *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (13).

The cases of *Shankar Dial* v. *Amir Haidar* (7) and *Nath Mal Das* v. *Tajamal Hossein* (8) were both referred to in the case of *Ram Ghulam* v. *Hazaru Kuar* (3), which we have already mentioned, and were distinguished from that case. In both these cases the judgment-debtor objected to the attachment

(1) 20 W. R., 162.
(2) 12 B. L. R., 65; 20 W. R., 280.
(3) I. L. R., 7 All., 547.
(4) I. L. R., 7 All., 733.
(5) I. L. R., 7 Mad., 255.
(6) I. L. R., 9 Bom., 458.
(7) I. L. R., 2 All., 752.
(8) I. L. R., 7 All., 36.
(9) I. L. R., 8 All., 626.
(10) I. L. R., 14 Calc., 316.
(11) I. L. R., 15 Calc., 438.
(12) I. L. R., 12 Calc., 458.
(13) I. L. R., 6 Calc., 777.

1889

MUNGESHUR KUAR v. JAMOONA PRASHAD.

of certain property, on the ground that such property was in his possession as trustee for an endowment and not in his own right; and it was held that the objection, although made by the judgment-debtor, was one properly falling under ss. 278—283 Civil Procedure Code, and that the order passed upon it was not appealable.

But in the present case the appellants claim the property in their own right. The case of *Bahari Lal* v. *Gauri Sahai* (1) is also different. There the judgment-debtor filled two distinct characters, one as representative of the original judgment-debtor, and the other as representative of a third party who had died after preferring a claim; and it was the order passed on this objection which was held to have been passed under s. 281, Civil Procedure Code.

The cases of *Fanindro Deb Raikut* v. *Jugudishwari Dabi* (2) and *Roop Lall Das* v. *Bekani Meah* (3) are clearly not on all fours with the present case. And in the case of *Kanai Lall Khan* v. *Soshi Bhuson Biswas* (4), the High Court held that there were special circumstances which took it out of the general rule established in the cases of *Chowdhry Wahed Ali* v. *Jumaee* (5) and of *Ameerunnissa Khatoon* v. *Mahomed Mozuffer Hossein Chowdhry* (6).

Lastly, there is the case of *Kameshwar Pershad* v. *Run Bahadur Singh* (7), to which our attention has been particularly drawn. But in that case there was no decision that the order passed by the Subordinate Judge did not fall under s. 244. On the contrary, the case appears to have been treated by the Subordinate Judge and the High Court as one coming under s. 244. The real point decided was that Run Bahadur could not be held liable as regards property which had devolved on him as reversionary heir of the husband of the deceased judgment-debtor, or as regards property which he been made over to him by the debtor prior to decree, and that in respect of such property he was not, properly speaking, the representative of the judgment-debtor.

(1) I. L. R., 8 All., 626.
(2) I. L. R., 14 Calc., 316.
(3) I. L. R., 15 Calc., 329.
(4) I. L. R., 6 Calc., 777.
(5) 11 B. L. R., 149; 18 W. R., 185.
(6) 12 B. L. R., 65; 20 W. R., 280.
(7) I. L. R., 12 Calc., 458.

We think therefore on a careful examination of all the reported cases bearing on the matter in dispute, that the weight of authority is in favour of the view we take, *viz.*, that the present case comes under s. 244.

Then as regards the second point argued before us, we think there has been no proper judicial enquiry as to whether the property in dispute belonged to the father or the mother of the appellants.

From an affidavit filed before us it would appear that it was understood before the Subordinate Judge that there was no question as to the property having originally belonged to the husband of the judgment-debtor, and it was for this reason that certain documentary evidence on this point tendered by the appellants was not received. The District Judge merely observes that there is no proof on the record that the properties attached belonged to the father's estate, while before us the matter is disputed. Under these circumstances we think the appellants are entitled to ask for a judicial enquiry, and that the proper course will be to set aside the District Judge's order, and to remand the case to him with directions to receive and consider any evidence that may be adduced by the parties in reference to the matter in dispute, that is, the ownership of the property, and then to re-try the appeal. We may add that we think the question of legal necessity does not arise in the execution of the decree. The decree-holder cannot go behind the decree. Costs will abide the event.

T. A. P. *Case remanded.*